

MARGARET A. MCLETCHE, Nevada Bar No. 10931

LEO S. WOLPERT, Nevada Bar No. 12658

MCLETCHE LAW GROUP, PLLC

602 South 10th Street

Las Vegas, NV 89101

Telephone: (702) 728-5300 / Fax: (702) 425-8220

Email: efile@nvlitigation.com

JOHN D. MCKAY, California Bar No. 220202 (*admitted pro hac vice*)

PARK AVENUE LAW LLC

201 Spear Street, Suite 1100

San Francisco, CA 94105

Telephone: (434) 531-9569 / Fax: (407) 264-6551

Email: johndmckayatty@gmail.com

Counsel for Plaintiffs Peter DelVecchia and A.D., a Minor

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

PETER DELVECCHIA, *et al.*,

Plaintiffs,

Vs.

FRONTIER AIRLINES, INC., *et al.*,

Defendants.

Case No: 2:19-CV-01322-KJD-DJA

**PLAINTIFFS' MOTION FOR
RELIEF PURSUANT TO
LR IC 3-1(c) FOR TECHNICAL FAILURE
PREVENTING TIMELY FILING**

Plaintiffs, Peter DelVecchia individually and as next friend of A. D., a minor ("A.D."), by counsel, respectfully move this Honorable Court, pursuant to Local Rule IC 3-1(c), for an order *nunc pro tunc* permitting their filing of their Response (ECF No. 281) to Defendants' Motion for Summary Judgment (ECF No. 266) on December 1, 2023 or, in the alternative, deeming their pending Corrected Motion to Extend Time (ECF No. 270) amended to request extension to file to and including December 1, 2023. This Motion is made and based upon the following memorandum of points and authorities, and all other pleadings and papers filed herein.

PLAINTIFFS' MOTION FOR RELIEF PURSUANT TO LR IC 3-1(c)

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs filed a Corrected Motion to Extend Time to File Response to Defendants' Motion for Summary Judgment on November 16, 2023, (ECF No. 270), requesting a two-week extension until November 30, 2023. That Motion was pending on the evening of November 30, and remains pending as of this writing. Defendants do not oppose that extension (ECF No. 276).

Plaintiffs' three attorneys worked diligently through the requested two-week period editing the Response down to a total of 51 pages,¹ checking and researching numerous pin cites to pages in the record for the Statement of Facts to make the relevant portions of the record easier for the Court to find, drafting a Motion for Leave to File several of the exhibits under seal (ECF No. 280), and creating Tables of Contents and Authorities as required for an oversize brief under LR 7-3(c).

Plaintiffs' counsel decided among themselves that Las Vegas-based counsel Leo S. Wolpert would file the main Response and its exhibits that were not to be filed under seal, and that filing would then be followed by counsel John D. McKay filing the several exhibits that were to be filed under seal, since Mr. McKay was the only one of them authorized by the Court and the TSA to handle the Sensitive Security Information (SSI) contained in some of those exhibits.

As noted in Mr. Wolpert's Declaration filed herewith, he created the final PDF of the Response for filing at approximately 9:15 p.m. PST and attempted to log on to the Court's ECF system at that time. His efforts were unsuccessful on two different computers connected to his firm's network, which was otherwise working correctly, and he also was unable to connect using his smartphone that was connected to AT&T's 5G network, which was also otherwise working correctly. As noted in his Declaration, he was not even able to send a message to the Court through the Court's website. He went home and attempted to log on to ECF using his home WIFI network and was similarly unsuccessful despite the fact that the home WIFI network was otherwise working correctly.

As noted in Mr. McKay's Declaration also filed herewith, Ms. McLetchie called him at 9:54 p.m. PST and asked him to try to connect to the Court's ECF system from there. While she was still on the phone, Mr. McKay attempted to log on and got only a blank white screen. Similar to Mr.

¹ Plaintiffs have also filed a motion for leave to file an oversized response of 51 pages, ECF No. 273, which is also pending.

1 Wolpert's experience, he was not even able to get to the page for entering his PACER logon
2 credentials. Ms. McLetchie informed him that she was getting the same result on her computer.

3 Mr. McKay continued trying to access the ECF system, using both Chrome and Safari browsers
4 and his smartphone, through 12:10 a.m. PST on December 1, to no avail. As indicated in his
5 Declaration, the Court's seal appeared at the top of the white screen at 11:57 p.m. PST on November
6 30, but clicking the link beneath it yielded no result over the following three minutes. Mr. McKay
7 filmed the lack of results from clicking the link on his smartphone and can provide that video to the
8 Court if the Court would like to see it. In fact, similar attempts yielded no results through 12:10 a.m.
9 PST.

10 Before business hours, Mr. McKay tried to file again at approximately 7:40 a.m. PST on
11 December 1, and found that the ECF system was then working normally. He succeeded in getting the
12 Response and unsealed exhibits all filed by 7:49 a.m. PST, and all the sealed exhibits filed by 8:23
13 a.m. PST.

14 Local Rule IC 3-1(c) states, "A filer whose filing is made untimely because of a technical
15 failure may seek appropriate relief from the court."² This Rule should be interpreted consistently with
16 Fed. Rev. Civ. P 1, which provides that the rules "should be construed, administered, and employed
17 by the court and the parties to secure the just, speedy, and inexpensive determination of every action
18 and proceeding." *See also See Eitel v. McCool*, 782 F.2d. 1470, 1472 (9th Cir. 1986) (noting the strong
19 policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits"); *Foman v.*
20 *Davis*, 371 U.S. 178, 181 (1962) (it is "entirely contrary to the spirit of the Federal Rules of Civil
21 Procedure" for a court to avoid making a decision on the merits because of "mere technicalities.")

22 Here, Plaintiffs were prepared to file timely and were only unable to do so due to technical
23 issues with the Court's website. There is no prejudice to Defendants as the documents were all filed
24 before business hours on December 1, 2023.

25 Plaintiffs respectfully ask the Court to find that "appropriate relief" as mentioned in LR IC 3-
26 1(c) includes an Order *nunc pro tunc* deeming the filing on the morning of December 1, 2023 timely,

27
28 ² Counsel have been unable to find any cases interpreting that Local Rule, and cases from other Districts
in the Ninth Circuit are not helpful because they concern local rules that have more specific provisions
than LR IC 3-1(c) does.

1 and/or an Order granting their Corrected Motion to Extend Time (ECF No. 270) but granting the
2 extension to include December 1, 2023, in light of the unforeseen technical failure of the Court's ECF
3 system during the evening of November 30, 2023.
4

5 DATED this 1st day of December, 2023.

6 /s/ John D. McKay
7 John D. McKay

8 ***Attorney for Plaintiffs Peter DelVecchia***
9 ***and A.D., a Minor***
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28